

Legislative Notice

No. 54 (Revised)

September 3, 2002

H.R. 5005 – An Act to Establish A Department of Homeland Security

Calendar No. 529

The Lieberman Amendment No. 4467 was reported from the Committee on Governmental Affairs in late July, 2002. There is no Committee report, but see S. Rpt. No. 107-175 on S. 2452.

NOTEWORTHY

- Per unanimous consent, the Senate today began consideration of the motion to proceed to H.R. 5005, on which there will be up to seven hours of debate. Time will be equally divided between Senators Lieberman and Thompson on one side and Senator Byrd on the other. At the conclusion or yielding back of time, there will be a vote on the motion to proceed. (On Wednesday morning, the Senate will be on other business until noon when it will return to H.R. 5005.)
- The House passed H.R. 5005 by a vote of 295 (207 R's; 88 D's) to 132 (11 R's; 119 D's; 2 I's). Surprisingly, perhaps, the key issues in the House had little to do with terrorism, weaponry, advanced technology, or international intrigue. The key issues were about labor policy and management flexibility. Those same issues probably will predominate in the Senate.
- Once the Senate gets to the underlying bill, the Senate is *not* likely to be considering the House-passed text. Instead, the Senate probably will be on the Lieberman substitute amendment No. 4467 as original text. Two Republicans on the Committee voted to report the amendment, but Senator Thompson and the majority of Republicans opposed it.
- Senator Gramm and 35 cosponsors have introduced the President's original text (S. 2794).
- The House bill is acceptable to the President, but he has strong objections to many provisions of the Lieberman amendment. Governor Ridge would recommend a veto if the Lieberman amendment were presented to the President. Senator Lieberman's 11-page "Dear Colleague" letter of August 29 contains a good summary of his views.

BACKGROUND

On June 18th, President Bush submitted to Congress his proposed legislation to create a new cabinet level Department of Homeland Security. Recognizing terrorism as a permanent threat to America, the President's intention was to consolidate the more than 100 agencies with a homeland security role into one distinct entity. The President seeks flexibility in budgetary and personnel matters, along with the preservation of long-standing national security powers with regard to labor-management relations.

The organizational challenges to the new department will be enormous – which is why the President has asked for adequate management flexibility. The Department of Homeland Security (DHS) will encompass some 170,000 employees, making it the third largest department of the Federal Government. Some estimates put DHS at 200,000 employees by counting 30,000 new baggage screeners. At that size, DHS would be the 17th largest private employer in America, with more employees than Safeway or Federal Express. In July, the Brookings Institution issued a report, noting the following:

“[T]he proposed department . . . will contain a vast array of largely incompatible management systems, including at least 80 different personnel systems mixed in and among the agencies. There are, for example, special pay rates for the Transportation Security Administration, the Secret Service, and the Biomedical Research Service; higher overtime rates for air marshals, the Secret Service, and immigration inspectors; guaranteed minimum overtime for Customs officers and immigration inspectors; Sunday, night, and premium pay for the Secret Service, Customs Service, and immigration inspectors; and foreign language awards and death benefits for Customs officers.

“The secretary [of DHS] will also oversee labor contracts with at least 18 separate employees unions, including 33,000 members of the American Federation of Government Employees, 12,000 members of the National Treasury Employees Union, and many others in the National Association of Agriculture Employees, the Metal Trades Council, International Association of Machinists and Aerospace Workers, Fraternal Order of Police, Boilermakers Brotherhood, and International Brotherhood of Police Officers.” Brookings Institution, *Assessing the Department of Homeland Security* (July 2002).

When President Carter asked for civil service reforms in the spring of 1978, he said the system had “become a bureaucratic maze which neglects merit, tolerates poor performance, permits abuse of legitimate employee rights, and mires every personnel action in red tape, delay and confusion.” Accordingly, Congress delivered the requested reforms in the Civil Service Reform Act of 1978, Public Law 95-454. The Brookings report of 2002, quoted above, now says, “The current civil service

personnel system underwhelms at virtually every task it is asked to do. It is slow at hiring, interminable at firing, permissive at promoting, useless at disciplining, and penurious at rewarding.”

The United States has some 95,000 miles of shoreline; its border with Canada is 5,525 miles long and its border with Mexico is 1,989 miles long. Every day, more than 1.3 million people and \$8.8 billion worth of goods are processed at entry points. S. Rpt. No. 107-175.

DHS will require the largest reorganization of the Federal Government since 1947, when the Department of Defense was created. Unlike 1947, however, the entities now being brought together have not had the same mission. DHS will combine agencies as dissimilar as FEMA, INS, APHIS, USCG, and part of CDC. The acronyms alone make the head spin.

BILL PROVISIONS

Amendment No. 4467

will create a cabinet-level Department of Homeland Security (DHS) to plan, coordinate, and implement activities relating to homeland security. The secretary of the Department will be appointed by the President and confirmed by the Senate. This page summarizes the structure of the new department which will comprise six directorates each headed by an undersecretary who will need Senate confirmation:

The **Directorate of Border and Transportation Protection** is responsible for securing borders, territorial waters, ports, waterways, air, land, and sea transportation systems. This directorate includes the Customs Service, which must be maintained as a distinct entity, and the Transportation Security Administration. It does not include the Border Patrol or INS enforcement, which are included in the Directorate of Immigration Affairs.

The **Directorate of Intelligence** will analyze information for the purpose of preventing, preparing for, and responding to threats of terrorism and other threats. The Counterterrorism Center of the CIA shall continue to have primary responsibility for the analysis of foreign intelligence relating to international terrorism. The division of labor among intelligence agencies is one of the key decisions that Congress will make.

The **Directorate of Critical Infrastructure Protection** will be responsible for receiving information to assess the vulnerabilities of key resources and critical infrastructure and for preventing, defending, and recovering from attacks.

The **Directorate of Emergency Preparedness and Response** will be responsible for carrying out federal emergency preparedness and response activities. The **Federal Emergency Management Agency** is under this directorate but must be maintained as a distinct entity.

The **Directorate of Immigration Affairs** *replaces the Immigration and Naturalization Service* with two divisions, a Bureau of Immigration Services with responsibility for visa petitions, naturalization, asylum and refugee applications, and a Bureau of Enforcement and Border Affairs with responsibility for border patrol, detention, removal, and investigations.

The **Directorate of Science and Technology** will be responsible for managing and supporting research, development, and testing to meet the needs of homeland security.

The **Coast Guard** also will be transferred to the Department, but it will report directly to the Secretary and be maintained as a distinct entity. Senators from coastal States are deeply interested in the future of the Coast Guard.

The **Secret Service** also is transferred to DHS but must be maintained as a distinct entity.

Ten Key Controversies

1. Management Flexibility in the Transition Process. Under Amendment No. 4467, the President has no authority to transfer funds to the new Department during the transition. Such transfers would require an additional appropriations Act. The Administration believes that DHS should be established as soon as possible, and that the organic act for DHS should contain an effective mechanism for funding the transition. The Administration relies on precedents from the establishment of the Departments of Agriculture and Energy.

2. Management Flexibility With Reorganization Authority. The President asked for authority to reorganize DHS by allocating or reallocating functions within the Department and by establishing, consolidating, altering, or discontinuing organizational units within the Department. He relied on precedents from the Departments of Energy and Education. Amendment No. 4467 does not give the President the authority he asked for. Section 191 of the Amendment begins by offering flexibility, but then snatches it back by saying that the authority does *not* apply to those entities and functions established by law. The Administration estimates that 65 percent of DHS employees would be working in offices where such authority does not apply.

3. Management Flexibility With Budget Transfer Authority. Because DHS will have to respond quickly and decisively to evolving threats, the President asked that the Secretary be given authority to transfer up to 5 percent of funding between DHS appropriations accounts, if a 15-day notice is given to the Appropriations Committees. There are precedents in the Departments of Defense, HHS, and Agriculture. Amendment No. 4467 includes no useful authority to transfer funds between appropriations accounts. Funds could be transferred, but still could be used only for the purpose for which they originally were available.

4. Management Flexibility In Personnel Matters. The President asked for statutory authority to create a personnel system that is “flexible, contemporary, and grounded in the public employment principles of merit and fitness,” and he promised that the new system would protect employee rights. The House gave the President less flexibility than he asked for, but it did give him some increased flexibility (see §761 of the House-passed bill). Amendment No. 4467 also contains some civil service reforms (such as modest hiring process reforms and corrections to anomalies in pay administration), but the changes fall far short of what is needed. On the other hand, Amendment No. 4467 also provides that an employee who is transferred into DHS may *not* be fired or receive less pay, nor may an employee’s terms and conditions of employment be altered. Further, Amendment No. 4467 does not allow the many pay systems that are being brought together under DHS to be harmonized .

There is precedent for management flexibility on personnel matters. Congress has given some flexibility to the Internal Revenue Service, 5 U.S.C.A. §9501 *et seq.*, but the best precedents are from the Transportation Security Administration (TSA) and the Federal Aviation Administration (FAA). Last fall, both the Senate and House recognized the need for broad flexibility in hiring and managing baggage screeners:

“Notwithstanding any other provision of law, the Under Secretary of Transportation for Security may employ, appoint, discipline, terminate, and fix the compensation, terms, and conditions of employment of Federal service for such a number of individuals as the Under Secretary determines to be necessary to carry out the screening functions of the Under Secretary under section 44901 of title 49, United States Code. The Under Secretary shall establish levels of compensation and other benefits for individuals so employed.” Aviation and Transportation Security Act, Pub. L. 107-71, §111(d), 115 Stat. 620, Nov. 19, 2001, codified at 49 U.S.C. §44935 note.

The flexibility Congress gave to the FAA has proven most helpful:

“In consultation with the employees of the Federal Aviation Administration and such non-governmental experts in personnel management systems as he may employ, and notwithstanding the provisions of title 5, United States Code, and other Federal personnel laws, the Administrator of the Federal Aviation Administration shall develop and implement . . . a personnel management system for the Federal Aviation Administration that addresses the unique demands on the agency’s workforce. Such a new system shall, at a minimum, provide for greater flexibility in the hiring, training, compensation, and location of personnel.” The Department of Transportation and Related Agencies Appropriations Act, 1996, Pub. L. 104-50, §347, 109 Stat. 460, Nov. 15, 1995, codified at 49 U.S.C. §106 note.

5. National Security Powers (the “Morella issue”). Long-standing law provides that a President may exclude an office or agency from coverage of the Labor - Management Relations Statute (related to collective bargaining) because of national security. (The law dates back to 1978 but the precedent dates back to President Kennedy.) Amendment No. 4467 *restricts this pre-existing*

presidential authority within DHS. Amendment No. 4467 intends to “grandfather” employees coming into the new department: If a President hadn’t excluded these employees in their old agencies, then they can’t be excluded when moved into DHS unless their jobs substantially change.

After a vigorous debate on the floor and before, the House of Representatives sustained the President’s authority but required him to go through another step. This was the Shays amendment which was passed in lieu of the Morella amendment.

6. Creation by Statute of a White House Office of Homeland Security. Amendment No. 4467 establishes a statutory National Office for Combating Terrorism within the White House. The director of the Office would be appointed by the President and confirmed by the Senate. The director of the Office would share responsibilities with the Secretary of Homeland Security, and thus create confusion. This office also would intrude – and seems specifically to be intended to intrude – on the confidential advice given to a President of the United States. The director of the proposed statutory office would not be a *confidential* advisor to the President, given Congress’s demands on Senate-confirmed officials.

7. The Davis-Bacon Act. The Davis-Bacon Act, 40 U.S.C. §276a *et seq.*, requires that “prevailing wages” be paid to workers on certain projects. Section 194 of Amendment No. 4467 will apply Davis-Bacon wage requirements to all construction projects “financed in whole or in part with assistance received under this Act.” This would be the first time Davis-Bacon has been applied to an entire department.

The Davis-Bacon requirement would apply to FEMA; therefore, some \$2 billion in disaster relief money would be covered by the Davis-Bacon requirement – immediately raising disaster relief costs by between \$200 million and \$400 million. Some FEMA programs provide assistance to individuals to rebuild their homes after disasters. Section 194 of Amendment No. 4467 will increase rebuilding costs for these individuals – making it even more difficult and costly to rebuild after a disaster.

Some Democrats argue that the Davis-Bacon provisions would not apply to existing agencies being rolled into the new department but would only apply to new entities, such as those under the Science and Technology Directorate.

8. Immigration. In the President’s DHS proposal, all of INS would be transferred to DHS but INS services and enforcement would be separated. Both the services component and the enforcement component would report to the Secretary through the Undersecretary for Border and Transportation Security. Amendment No. 4467 transfers INS services and enforcement to DHS, but puts them in a new directorate called Immigration Affairs. At the same time, in Amendment No. 4467 there is another directorate for border protection. This bifurcation means that the undersecretary in charge of securing America’s borders (the Undersecretary for Border and Transportation Protection) will not have the Border Patrol or immigration inspectors under his command. Among Republican Senators, there is disagreement about the best way to proceed on immigration reform.

9. Intelligence Gathering, Analysis, and Application. The President's goal is to fill a significant gap in intelligence gathering – of matching threat assessment to vulnerability analysis. The Administration believes the Lieberman bill fails to fill that gap. The President hoped to merge the capabilities “to identify and assess threats to the homeland, map those threats against our vulnerabilities, issue timely warnings and act to secure the homeland” under a single official, the Undersecretary for Information Analysis and Infrastructure Protection. Amendment No. 4467 created two Directorates that have intelligence responsibilities, (1) Intelligence and (2) Infrastructure Protection, and a third, Science and Technology, also has some intelligence duties. The legislation also provides for a significant flow of raw data from other Executive Branch entities to the new Department. The Administration fears that this new arrangement will reduce the ability of the President to carefully balance other national security concerns. The Administration also believes that the new statutory requirements will require DHS to “drink from a fire hose” – *i.e.*, to be overloaded with a flood of raw intelligence data. There seems to be a consensus that decisions about intelligence functions and components will be one of the most important issues that the Senate will address.

10. The Coast Guard. The President proposed that the Coast Guard be transferred to DHS as a distinct entity that would maintain its existing independent identity as a military organization under the leadership of its Commandant. Amendment No. 4467 includes the Coast Guard in the new Department, but with significant restrictions on its operational flexibility. The U.S. Coast Guard is recognized by all as one of the finest organizations of the Federal Government, and its role is jealously guarded by Members from coastal States.

ADMINISTRATION POSITION

The official Statement of Administration Position (SAP) on the Lieberman Amendment was expected today. Until it is issued, the SAP on the House bill is still useful.

COST

“CBO estimates that implementing [Amendment No. 4467] would cost about \$11 billion over the 2003-2007 period, assuming appropriation amounts. Of this amount, we estimate that about \$10.6 billion would be funded through appropriations – \$1.1 billion for the added costs of creating and administering the new department and \$9.5 billion for new programs and activities authorized by the bill. The \$10.6 billion is in addition to projected net spending for ongoing activities of the transferred agencies – about \$19 billion in 2002, growing to over \$33 billion by 2007 under CBO's baseline

assumptions. The estimate does not include the cost of developing the integrated information and communications systems authorized by section 171. Such costs could exceed \$1 billion, but CBO has no basis to estimate them with precision. . . . Enacting [Amendment No. 4467] also would increase direct spending from federal retirement funds by about . . . \$650 million over the 2003-2012 period. . . .” CBO Cost Estimate of Aug. 14, 2002, on S. 2452 as ordered reported by the Senate Committee on Governmental Affairs, July 25, 2002.

CBO estimated the House bill at an additional \$4.5 billion over the years 2003-2007, and the House bill had nearly \$600 million for a new Federal building which the Senate amendment doesn’t have. The Senate, however, did include \$1.2 billion for grants to Amtrak (§168); \$1.2 billion in payments to employees who elect to separate from the Government (Title XXII); \$2.0 billion in grants for firefighting (§169); and \$1.9 billion for the National Bio-Weapons Defense Analysis Center (§161).

OTHER VIEWS

The President, Governor Ridge, and others in the Administration are not alone in pleading for management flexibility. For example, two key members of the “Hart-Rudman Commission,” former Republican Senator Warren Rudman and former Democratic Representative Lee Hamilton, wrote to the House of Representatives and urged Congress to give the President flexibility, which they see as essential to national security. They said:

“On February 15, 2001, we issued the final of three reports from the U.S. Commission on National Security / 21st Century. . . . In that report we issued a series of recommendations for improving our ability to maintain America’s leadership role into the future.

“One of those recommendations was to create a separate organization within the Federal Government to focus on protecting the borders, critical infrastructure protection, and emergency preparedness. We are pleased to see the essence of that recommendation moving forward in the President’s plan. . . .

“Key to making the new Homeland Security Department successful will be having an agile, flexible personnel system. Another of our conclusions from [our] three-year study is that today’s Civil Service system has become a drag on our national security. The morass of rules, regulations, and bureaucracy prevent the Government from hiring and retaining the work force that is needed to combat the threats of the future. Our specific recommendation was to eliminate recruitment hurdles for Civil Service, ensure a faster and easier hiring process, and see to it that strengthened professional education and retention programs are worthy of full funding by Congress.

“As [Congress] debate[s] the Homeland Security Act, we urge you provide the President and the Department the tools they need to do the job. Creating an agile and contemporary work force that is flexible and adheres to the public employment principles of merit and fitness is essential. Any less would be a disservice to the work force of the new Department and the American people.”

Letter from Warren Rudman and Lee Hamilton to Hon. Richard Arney and Hon. Nancy Pelosi, July 25, 2002 (emphasis added).

POSSIBLE AMENDMENTS

As of the end of August, the Lieberman Amendment No. 4467 was the only amendment that had been introduced. Many amendments are expected, including long and short, germane and unrelated, and from both sides of the aisle, including some from Republicans on the Governmental Affairs Committee, and some offered on behalf of the White House. See pp 4-7 of this Notice for details on the key items of controversy.

The following list was provided by Senator Lieberman (but certainly does not include all of the likely amendments):

Unknown.	To revise the immigration components of the new department.
Hollings.	To remove the Coast Guard from the new department.
Hollings.	To make the Transportation Security Administration a distinct entity within the new department.
Hollings.	To clarify that regulation of transportation of hazardous materials remain at the Transportation Department.
Hollings.	To require the Secretary of Homeland Security to consult with the Secretary of Transportation and FAA Administrator on aviation issues.
Jeffords.	To remove FEMA from the new department.
Kohl.	To include the Bureau of Alcohol, Tobacco and Firearms in the new department.

Leahy.	To prohibit implementation of Operation TIPS (the Terrorism Information and Prevention System, under the Department of Justice, created by a Presidential directive in January).
Sarbanes/Mikulski/ Warner/Allen.	To enhance security coordination in the DC metro region.
Conrad.	Related to “informatics.”
Collins/Carper.	To establish an Assistant to the Secretary for economic security.
Wellstone.	To bar government contracts to offshore companies.
Corzine.	Related to chemical plant security.
Grassley.	Related to chemical plant security.
Grassley.	To tighten visa issuance process.
Gregg.	To separate the Office of Domestic Preparedness (currently at the Department of Justice) from FEMA.
Nelson (FL).	To authorize federal funds to clean up the anthrax-contaminated Florida office building.
Smith (NH).	To authorize commercial pilots to carry firearms.
Clinton.	Related to mental health benefits for victims of terrorist attacks.
Clinton.	To enhance security along the U.S.-Canadian border.
Landrieu.	To direct the FCC to license the use of low-frequency spectrum to provide emergency broadcasts in rural areas.
Allen.	Related to a national emergency technology guard (NET Guard).
Feingold.	To repeal immunity to Customs Service officers.
Torricelli.	Related to privacy.
Edwards/Schumer.	To establish a privacy commission.
Gregg/Feinstein.	Related to the use of Social Security numbers.

Levin/Akaka. Related to whistleblower protection.

Grassley. Related to the Customs Service.

Hatch. Related to penalties for cyber-terrorism.

Unknown. To extend the deadline for airport baggage-screen compliance.

Additionally, Senator Lieberman indicated he expected one or more amendments to be offered by Senator Byrd intended to delay final consideration.

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